

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GLORIA DELGADO</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket No. 250,157
Self-Insured Respondent	)	

**ORDER**

Claimant requested review of the October 28, 2004 Award Upon Review and Modification by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 12, 2005.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Jason J. Montgomery of Kansas City, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record listed in the Award Upon Review and Modification.

**ISSUES**

On October 24, 2000, the parties entered into an agreed award in this claim. Claimant was awarded compensation for an 11.5 percent whole body functional impairment for bilateral shoulder injuries. On April 24, 2001, claimant's employment with respondent was terminated. Claimant subsequently filed an application for review and modification of the agreed award. The litigated issue was whether claimant was entitled to a work disability (a permanent partial general disability greater than the whole body functional impairment rating) or whether claimant failed to make a good faith effort to retain accommodated employment with respondent that paid more than 90 percent of her pre-injury average gross weekly wage.

The Administrative Law Judge (ALJ) found claimant was terminated for cause. Therefore, the ALJ imputed the wages claimant was earning while working for respondent for purposes of her post-injury wage and denied her request for a work disability.

Consequently, the ALJ denied claimant's request for modification of the October 24, 2000 Agreed Award.

Claimant requests review of whether the ALJ erred in denying claimant's request for modification of the agreed award. She argues that her actions which resulted in separate instances of disciplinary action and, ultimately her termination, were not willful. Consequently, she further argues such actions did not constitute a lack of good faith and she is entitled to a 58 percent work disability based upon her actual 100 percent wage loss and a 16 percent task loss.

Respondent contends claimant was terminated for cause based upon its progressive discipline policy. Respondent further argues claimant's own actions led to her termination from employment and but for those actions she would still be employed. Respondent contends claimant failed to make a good faith effort to retain her accommodated employment. Consequently, respondent requests the Board to affirm the ALJ's Award Upon Review and Modification.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Briefly summarized, the facts are undisputed that claimant had received an oral and written warning for poor job performance, a one-day suspension for poor job performance, and finally, the claimant was terminated for leaving her work area early without completing her job assignments.

It is disputed by claimant that she was required to clean up in the storage area after completion of her accommodated job packing tongues in boxes. However, claimant's supervisor had counseled her that she was required to clean up the storage area both before and after the conclusion of her regular accommodated job boxing tongues. And a supervisor observed claimant leave work early on the night in question and her co-workers corroborated claimant had not only left work early but also had not cleaned the storage area.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.<sup>1</sup> In this case, claimant was terminated for violating respondent's policies. Although claimant disputes the factual basis for the termination, the Board finds the record fails to establish

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<sup>1</sup> *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds that the greater weight of the evidence supports a finding that claimant was insubordinate as alleged. The Board concludes claimant's actions were a willful and knowing violation of the respondent's rules and policies. As such, claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foulk*<sup>2</sup> or a failure to make a good faith effort to retain appropriate employment as described in *Copeland*<sup>3</sup>. Accordingly, because claimant was terminated for misconduct, the wage she was earning and would have continued to earn had she continued working for respondent should be imputed to her. As this was at least 90 percent of her average weekly wage, her permanent partial general disability award is based upon her permanent functional impairment.<sup>4</sup>

The claimant also argues that even if she was terminated for cause from an accommodated job that was within her restrictions, she remains entitled to a work disability because her termination was not in good faith. In *Niesz*<sup>5</sup>, the Court found that where a worker's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. In this case, however, respondent conducted an adequate investigation of the facts. As noted, her supervisor had counseled claimant that she was to clean the storage area after completion of her regular duties. Several co-workers confirmed claimant left work early without cleaning the storage area. The evidence shows that respondent did not act arbitrarily or in bad faith.

If claimant's termination was based solely upon her poor job performance, the Board might have concluded that neither party acted in bad faith and that a work disability award was not precluded. However, in this case there is also the problem with insubordination. This was willful conduct by claimant and demonstrated a degree of bad faith on her part. It is this element of willfulness that causes the Board to conclude that claimant's conduct and resulting termination was tantamount to a refusal to perform work. The accommodated job was within claimant's restrictions. Again, the Board does not find that the progressive discipline was a pretext for terminating claimant because of her workers' compensation claim, or that the respondent otherwise acted in bad faith.

Claimant was terminated for cause from an accommodated job which was within her restrictions. Accordingly, the post-injury wage claimant was earning with respondent

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<sup>2</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>3</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>4</sup> K.S.A. 44-510e (Furse 1993).

<sup>5</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

before her termination will be imputed to her. As this wage was more than 90 percent of the average gross weekly wage claimant was earning at time of this accident, she is precluded from receiving a permanent partial disability award in excess of the percentage of functional impairment.

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award Upon Review and Modification of Administrative Law Judge Brad E. Avery dated October 28, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Jason J. Montgomery, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director